Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,
Petitioner,

v.

COUNTY OF SANTA BARBARA *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a county may take a permanent easement over private property, and thereby deprive the owner of the right to exclude, without satisfying either the nexus or proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) or *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and without paying just compensation, solely because two decades earlier the State was able to "extort" from a prior owner an offer to dedicate that easement as a condition of obtaining a building permit?

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the Board of Supervisors of the County of Santa Barbara is a respondent in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph L. Cole, Trustee of the Stanford Farms Trust, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The California Supreme Court order denying the Petition for Review and Publication request is not reported. Appendix to the Petition of Certiorari ("Pet. App.") 20a. The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Six, affirming the judgment of the Superior Court of the State of California for the County of Santa Barbara is not reported, but can be found at 2001 WL 1613856. Pet. App. 1a-16a. The opinion of the Superior Court of the State of California for the County of Santa Barbara sustaining respondent's demurrer to petitioner's constitutional claims without leave to amend and granting respondent's motion to dismiss petitioner's claim under the California Environmental Quality Act is not published. Pet. App. 17a-19a.

JURISDICTION

The judgment of the California Supreme Court was entered on March 13, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. At its core, this case poses a simple and important question: can local governments evade the restrictions on compelled dedication of public access easements that this Court announced in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), through the expedient of taking private property in two discrete steps, neither of which may be challenged as an unconstitutional taking? In *Nollan*, this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case arises from a 1980 Coastal Commission permit decision that employed a slightly different, and far more typical, form of extortion: as a condition of approving a 570 square-foot addition, the Coastal Commission required petitioner's predecessor-in-interest not to convey an access easement outright, but to record an offer to dedicate a 77,000 square-foot easement – an offer that would expire in 21 years unless accepted by another local governmental entity.

In the decision below, the lower court ruled that the County of Santa Barbara was free to accept this coerced offer to dedicate without paying any compensation for the resulting easement and without having to demonstrate any nexus between any alleged adverse impacts caused by the owner's construction project and the easement she was required to offer. According to the lower court, the prior property owner's failure to bring a takings challenge to the 1980 permit decision – a decision that did not itself deprive the prior property owner of any possessory interest in her property, and did not compel such a deprivation at any time

thereafter – barred petitioner's prompt challenge to the legally distinct governmental action of the County, which accepted the coerced offer to dedicate in 2000 and thereby first stripped petitioner of the fundamental right to exclude others from the Trust's beachfront property. Unless this Court grants review of the decision below, other local governments in California will be free to accept literally hundreds of soon-to-expire offers to dedicate easements, all of which were coerced in blatant violation of the restrictions announced in *Nollan*, and all of which can now be accepted, under the decision below, without satisfying the commands of the Fifth Amendment.

2. In the late 1970s, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate easements over their beachfront to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would expire. Conversely, acceptance conveyed actual title to the public access easement to the accepting agency in perpetuity.

Acceptance of such offers, however, was by no means certain. An accepting entity had to ensure that it was able to assume the often significant liabilities and maintenance costs that attend ownership of public beach property. *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Cal. Ct. App. 1985). In addition, because local governments would not accept an easement that the public could not reach (and thus could not use), the acceptance of an offer to dedicate often depended on whether the Coastal Commission could extort offers to dedicate easements over neighboring properties, an event that depended, in turn, on whether the owners of such neighboring property would seek construction permits from the Commission. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Cal. Ct. App. 1985).

In 1980, Francice Bushkin applied for a coastal development permit to build an addition to an existing

guesthouse on her a 25-acre parcel of property in Santa Barbara. Pet. App. 1a. The proposed addition was to consist of a 196-square-foot sunroom and a 374-square-foot deck, or a total of 570 square feet. *Id.* Although these improvements were to be built 920 feet inland from a 60-foot coastal bluff, on property accessible only by a private road, the Coastal Commission refused to grant Bushkin a permit unless she agreed to record an offer to dedicate a 77,000 square-foot public lateral easement across her beachfront property (*i.e.*, an easement running parallel to the ocean). See *id.* at 1a-2a. The Commission made no finding that the proposed addition had any impact on public access to the beach, nor could it have done so: the modest 570 square-foot improvements to the property were not visible from any public roadway or from any beach.

Bushkin accepted the building permit, built the sunroom and deck, and recorded an offer to dedicate the easement in May 1982. The offer to dedicate was to expire unless it was accepted by a public agency within 21 years of its recordation. The Stanford Farms Trust acquired the Bushkin property, subject to the offer to dedicate, in 1995, eight years after this Court handed down its decision in *Nollan*.

By the late 1990s, the Commission had collected over 1,000 offers to dedicate public easements across private coastal property, but very few, if any, had been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. On October 6, 1998, the County of Santa Barbara conducted a public hearing to consider whether to accept 72 outstanding offers to dedicate easements over coastal property located in the County, including the offer to dedicate recorded by Bushkin. The Trustee for the Stanford Farms Trust appeared at the hearing and objected to the proposed acceptance of the offer to dedicate an easement over the Trust's property on the

grounds that acceptance would violate the requirement, set forth in *Nollan* and in this Court's subsequent decision in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), that a compelled easement must be roughly proportionate to the nature and extent of any adverse impact caused by the underlying construction project. The County decided to delay action on 26 offers to dedicate, including the offer to dedicate affecting the Trust's property.

On October 16, 1998, the Trust recorded a Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement with the Santa Barbara Recorder's Office. The Notice stated that the offer to dedicate was revoked and rescinded on the basis of *Nollan* and *Dolan*. The Notice was recorded to give effective legal notice to all interested parties of the Trust's claim that the offer to dedicate was invalid after *Nollan*, and that the Trust therefore was entitled to rescind the offer to dedicate. On October 16, 1998, the day the Notice was recorded, the Trust's attorneys sent the Notice to the County, advising the County that the Trust had revoked the offer. Pet. App. 3a.

On March 15, 1999, the Coastal Commission issued a "cease and desist" order, directing the Trust to cancel the Notice of Revocation and to refrain from engaging in any further activities that would be inconsistent with the previously issued permit. Pet. App. 3a. This order exposes petitioner to civil penalties of up to $6,000 a day for failure to comply. In addition, petitioner is exposed to civil penalties of up to $15,000 a day for failure to comply with the original permit condition. See Cal. Pub. Res. Code §§ 30821.6 & 30820(b). In April 1999, the Trust filed a complaint against the Commission, seeking declaratory relief, rescission of the irrevocable offer to dedicate, and a writ of mandamus. Pet. App. 3a.

While that action was pending,[1] the County moved ahead with its efforts to accept the offer to dedicate that the Coastal Commission had extracted from Bushkin. On February 15, 2000, the County adopted a resolution accepting the lateral easement across the entire beachfront of the Trust's property. In so doing, the County conducted a substantive review of the proposal to accept the outstanding offers to dedicate within its jurisdiction, but refused to consider whether acceptance would violate the Trust's constitutional rights in light of *Nollan* and *Dolan*. The County made no effort to show that its acquisition of the easement satisfied the nexus and proportionality requirements of the Fifth Amendment, and instead simply recorded its acceptance of the offer to dedicate on March 23, 2000.

On April 17, 2000, fewer than 30 days after the County accepted the offer to dedicate, petitioner filed this action against the County. The complaint, as amended, included claims for redress under 42 U.S.C. § 1983 for violations of substantive and procedural due process and equal protection, and a request for a declaration under § 1983 and the California Code of Civil Procedure that acceptance of the offer to dedicate violated the Fifth and Fourteenth Amendments of the United States Constitution.

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[1] In January 2000, after petitioner's suit against the Coastal Commission was transferred from Los Angeles County Superior Court, the San Francisco County Superior Court sustained the Commission's demurrer to petitioner's first two causes of action. Petitioner filed a writ of mandate in the Court of Appeal seeking to set aside the order sustaining the demurrer, but the writ was denied. Thereafter, he filed a motion seeking to strike the Coastal Commission's cross-complaint as a Strategic Lawsuit Against Public Participation under the California Code of Civil Procedure § 425.16, and that motion was denied, as was the subsequent petition for writ filed in the Court of Appeal. Petitioner's lawsuit against the Coastal Commission, which does not give rise to this petition, is still pending in the San Francisco Superior Court.

The County filed a demurrer and a motion to dismiss. Notably, the County did not contend that its acceptance of the offer was lawful under *Nollan* and *Dolan*. Instead, the County alleged that petitioner's challenge was an untimely and improper collateral attack on the *original permit condition* and was thus barred by principles of res judicata and waiver. Relying on § 30801 of the California Public Resources Code, which governs judicial review of Coastal Commission decisions, the County argued that the taking challenge petitioner asserted could only have been brought within 60 days of the Coastal Commission's original permit decision in 1980. The County further argued that the Trust lacked standing as a subsequent owner that had purchased the property after the easement had been irrevocably conveyed.

In opposition, petitioner noted that the complaint did not challenge the actions of the Coastal Commission or the original permit condition, but instead challenged the County's wholly separate and legally distinct action of accepting the coerced offer to dedicate. Petitioner noted that this challenge to the County's actions was timely under section 30802 of the Public Resources Code, which provides for judicial review of decisions and actions of local governments implementing certified local coastal programs, because the County did not take final action to acquire the easement until March 2000. Petitioner also argued that his challenge was timely under 42 U.S.C. § 1983. Nevertheless, on December 13, 2000, the Superior Court sustained the demurrer without leave to amend.[2]

3. The Court of Appeal affirmed that judgment in an unpublished opinion filed on December 17, 2001. The Court of Appeal did not dispute petitioner's showing that, after the

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[2] The Superior Court also granted the County's motion to dismiss petitioner's claim under the California Environmental Quality Act. Although petitioner pursued that claim in his appeals below, his state law claim is not subject to review in this Court.

Coastal Commission's 1980 permit decision, the Trust had retained valuable property rights in the portion of the land subject to the offer to dedicate, and that those rights were not extinguished until the County accepted the offer in 2000. Instead, the court adopted the County's argument that any challenge to the County's acceptance of the offer to dedicate was an impermissible collateral attack on the 1980 permit itself. Noting that Bushkin had failed to challenge the permit decision by filing a petition for a writ of administrative mandate under Public Resources Code § 30801, Pet. App. 7a, the court concluded that the Commission's permit decision, and the offer to dedicate that it compelled, were "immune from collateral attack and that the causes of action set forth in the trustee's amended complaint are barred by the doctrines of res judicata and waiver." *Id.* at 11a. The court reasoned that "[t]he validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint," and that petitioner's claims "are derived from and dependent upon the original permit condition the predecessor in interest failed to timely challenge." *Id.* at 12a. The court concluded that "[t]o allow the instant challenge to the permit condition would circumvent the system of review provided under Code of Civil Procedure section 1094.5." *Id.* The court did not address petitioner's contentions that the challenge was timely under both California Public Resource Code § 30802 and 42 U.S.C. § 1983.

The court also dismissed petitioner's contention that a takings claim seeking compensation for the loss of the right to exclude others was not ripe until the County accepted the offer to dedicate. Petitioner, citing *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), argued that no governmental entity had reached a final decision as to the disposition of the Trust's property until the County chose to accept the offer to dedicate. In addition, petitioner noted that the County itself had admitted that no easement was created by the offer to dedicate – an admission that was wholly inconsistent with any

contention that the Trust's taking claim was ripe in 1980. Finally, petitioner noted that the County's ripeness theory would lead to undeserved windfalls: an original property owner would be entitled to recover compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, might be suffered only by a subsequent property owner. Failing to address these arguments, the court below dismissed the Trust's ripeness arguments on the ground that *Palazzolo* "does not address the situation . . . where the predecessor in interest acquiesced in the restriction and accepted the benefits." Pet. App. 14a.

Petitioner filed a Petition for Review in the Supreme Court of the State of California on January 25, 2002. On March 13, 2002, the California Supreme Court denied the Petition for Review.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeal adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the County of Santa Barbara to take a 77,000 square-foot easement that, in plain contravention of this Court's holdings, is wildly disproportionate to the construction project to which the easement is tied, and for which the County will never pay a penny in compensation. The California Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec.

17, 2001). The lower court's failure to prevent such open flouting of this Court's rulings is a compelling ground, in and of itself, to justify review of the decision below.

But a blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar the court of appeal adopted rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the County's conduct caused. Notwithstanding the Coastal Commission's exaction of an offer to dedicate an easement, the Trust continued to enjoy the fundamental rights to use its property and to exclude others from that property. It was the County's acceptance of the offer to dedicate that stripped the Trust of these fundamental rights. By failing to recognize the separate deprivation that the County's conduct caused, the lower court allowed the County to violate the Trust's constitutional rights with impunity.

Second, the lower court's procedural rule rests on a clearly mistaken understanding of ripeness principles in the takings context. Because the Coastal Commission's permit decision neither stripped the Trust of its right to exclude others nor necessarily compelled such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in a 1980 challenge to the Commission's decision. Plainly, any challenge to *County* conduct that did not occur until 2000, and that might never have occurred, was in no sense "ripe" in 1980.

As a direct result of these errors, the County escaped its "categorical duty" to pay compensation for an appropriation of property that "dispossesse[d] the owner [of its] right to exclude others," *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, No. 00-1167, slip op. at 18, 20 n.19 (U.S. Apr. 23, 2002), *available at* 2002 WL 654431, and the Coastal Commission was improperly allowed "to put an expiration date on the Takings Clause." *Palazzolo*, 533

U.S. at 627. Absent review by this Court, moreover, these constitutional violations will by no means be isolated. The decision below clears the way for acceptance of literally hundreds of other coerced offers to dedicate easements that are due to expire in the next few years – offers that the Coastal Commission is making every effort to ensure are accepted. In addition, the decision below provides a clear roadmap that other States may use to escape the commands of *Nollan* and *Dolan* and to appropriate beachfront and other valuable easements without paying any compensation.

I. THE COUNTY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency coerces a property owner to record an *offer* to dedicate a public access easement that does not satisfy the substantial nexus requirement announced in *Nollan* and *Dolan*, and a separate governmental entity later *accepts* that offer, does the latter decision work a legally distinct deprivation of property without just compensation? The court of appeal concluded that it does not, and that any constitutional injury the property owner suffers flows from the initial decision to compel the offer. That conclusion, which is one of the central predicates underlying the lower courts procedural bar, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not require the original property owner, Ms. Bushkin, to convey title to the easement outright. Rather, it demanded that she record only an offer to dedicate an easement. By its terms, this offer to dedicate was made irrevocable for a period of 21

years; if it was not accepted during that period, the offer would expire.

Under California law, it is well-established that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to the easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency").

The corollary to this rule, of course, is that an offer to dedicate does not itself divest the property owner of the right to use the subject property or to exclude others from that property. To the contrary, Ms. Bushkin retained the essential bundle of rights that attach to ownership of property. Indeed, in *Grupe*, the court explained that an offer to dedicate like the one at issue here created "no easement and respondent can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whalers' Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission required Ms. Bushkin to execute an offer to dedicate a lateral easement, she retained full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as

property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's permit decision render the loss of these rights inevitable. In fact, the likelihood that the easement would be accepted was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02. And of course, if no public agency formally accepted the offer to dedicate within 21 years of recordation, the offer would expire by it terms and the owner of the property would retain title completely unburdened by the offer. See *id.* at 602.

It is thus clear that it was the County's acceptance of the offer to dedicate in March 2000, and not the Coastal Commission's 1980 permit decision, that deprived the Trust of the right to use the 77,000 square feet of property and to exclude others from that property. As a result of the County's acceptance, the Trust is forced to bear what amounts to a "'permanent physical occupation'" of its property, by virtue of the public's unfettered right to use the land "to pass to and fro," *Nollan*, 483 U.S. at 832, and petitioner's right to exclude others has been permanently extinguished. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 723 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"). As a matter of federal constitutional law, the County's acceptance of the offer to dedicate worked a legally distinct deprivation of property for which the County either must pay compensation or demonstrate that the nexus and proportionality requirements of *Nollan* and *Dolan* have been satisfied.

In concluding otherwise, the court of appeal reasoned that "[t]he validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint," and that petitioner's claims "are derived from and dependent upon the original permit condition the predecessor in interest failed to timely challenge." Pet. App. 12a. Although the Coastal Commission's decision to impose the unconstitutional

condition was plainly a necessary predicate for the County's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the offer to dedicate, the County made a purely discretionary decision that was not compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original permit decision made possible but did not, by itself, cause. See *Whalers' Village Club*, 220 Cal. Rptr. at 14-15.[3]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the County, the County's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

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[3] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate an easement for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

II. NO CHALLENGE TO A DEPRIVATION OF THE TRUST'S RIGHT TO USE THE PROPERTY AND TO EXCLUDE OTHERS FROM IT WAS "RIPE" IN 1980.

The decision below also rests on a fundamental misapprehension of federal ripeness principles. That misapprehension led the lower court to adopt a procedural rule that barred judicial review of a valid takings claim, and thereby impermissibly "relieve[d] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that perceived notions of administrative efficiency cannot trump the requirements of the Takings Clause.

This Court has consistently ruled that a property owner may not pursue a takings challenge until there has been a final government decision. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620 (property owner cannot establish a takings challenge "before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation"). Under California law, it is clear that no state agency made a final decision to divest the Trust of its right to use and exclude others from the beachfront property until the County finally accepted the offer to dedicate in March 2000. Thus, any claim the original property owner could have brought seeking redress for a physical taking would have been entirely premature in 1980; at that time, and for nearly 20 years thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The court of appeal's conclusion that petitioner's claims were barred by Bushkin's failure to file a petition for a writ of administrative mandamus within 60 days of the Commission's 1980 permit decision is flatly inconsistent with these ripeness principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the County's acceptance of the offer to dedicate was not "ripe" when the offer to dedicate was recorded, and that Bushkin could not have brought (and thus could not have waived) any challenge to that taking in 1980. Indeed, the court of appeal's flawed reasoning would allow a recording landowner to obtain an undeserved windfall – she would be entitled to compensation for the full value of a property loss that might never come to pass, or, as happened in the present case, that might be suffered by a subsequent property owner. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

None of the policies the court of appeal cited below, moreover, supports its procedural bar. The court noted that:

> "[o]nce aware of a challenge from whatever source, an agency can cancel, change, or stay enforcement of a challenged action, or otherwise mitigate damages. On the other hand, if persons affected by adverse administrative actions – be they landowners, permit applicants, or others – were permitted to refrain from challenging such actions until mitigation of damages by the government becomes impossible through the passage of time or events, and then present monetary claims, the financial burden on government could become overwhelming."

Pet. App. 11a (quoting *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 11 Cal. Rptr. 2d 824, 836-37 (Cal. Ct. App. 1992)). Petitioner asserted his taking claim, however, in a manner that is fully consistent with the policies the court of appeal relied on to justify preclusion of that

claim. He afforded the County – the state entity that actually deprived the Trust of its fundamental property rights – ample warning and opportunity to avoid exposure for takings damages, by repeatedly urging the County not to accept an easement that bore no substantial nexus or rough proportionality to the construction project to which the easement was tied. Petitioner then brought suit within 30 days of the County's acceptance of the offer to dedicate, not "three or five years later . . . [when] meaningful governmental fiscal planning . . . [became] impossible," *Patrick Media Group, Inc.* v. *California Coastal Commission*, 11 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 1992); indeed, petitioner claims that the taking dates only from March 2000, not May 1980, when the Commission imposed the original permit condition.

In all events, this Court has made clear that the type of policy considerations that the court of appeal cited cannot justify a procedural scheme that forecloses judicial review of valid takings claims. In *First English*, this Court addressed a procedural scheme that prohibited landowners from challenging a "regulatory" taking in an action for inverse condemnation, and thus effectively barred compensation for temporary takings. Citing the "need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy," the California Supreme Court had held, in *Agins* v. *Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980), that a landowner must first establish that a regulation is excessive in an action for declaratory relief or for a writ of mandamus, and thus cannot recover damages for any "temporary" taking that occurs prior to the government's decision to withdraw the regulation in response to a court finding of excessiveness. *Id.* at 29-31. Although this Court acknowledged the validity of the policies that led to the adoption of this procedural scheme, *First English*, 482 U.S. at 317, it held that a State may not adopt a review scheme that "relieve[s] it of the duty to provide

compensation for the period during which the taking was effective." *Id.* at 321.

So too here, policies supporting prompt review of administrative action cannot compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding all judicial review of an unquestionably meritorious takings claim. The California legislature itself has explicitly recognized that local governments play a role, separate and unique from that of the Coastal Commission, in implementing coastal programs and has provided a separate remedy for any injuries that local governments cause through such implementation. See Cal. Pub. Res. Code § 30802 ("[a]ny person . . . aggrieved by the decision or action of a local government that is implementing a certified local coastal program . . . ha[s] a right to judicial review of such decision or action"). The decision below improperly forecloses this avenue of redress, as well as that provided under 42 U.S.C. § 1983, for an unconstitutional taking based on a procedural waiver rule that is irreconciliable with governing ripeness doctrine. This Court should grant the petition to confirm that preclusion of such valid takings claims is impermissible, and cannot be justified by claims of administrative efficiency.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Unless this Court grants review, the unconstitutional taking of coastal property that occurred in this case will not be an isolated incident. First, literally hundreds of other offers to dedicate easements that the Coastal Commission coerced before this Court's decision in *Nollan* are due to expire soon, and the Commission has made clear its intention to secure acceptance of as many of these easements as possible. See James Rainey, *Faster Action by Agencies Is Preserving Beach*

Access, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956. If this Court declines to review the decision below, local governments throughout California will understand that they are free to accept these outstanding offers to dedicate without fear of incurring takings liability.

Indeed, absent review by this Court, it is unlikely that many other property owners will even attempt to challenge such acceptance decisions. In its zeal to obtain acceptance of hundreds of outstanding offers to dedicate easements, the Coastal Commission took the extraordinary step of enjoining petitioner from resisting such efforts, and is threatening him personally (not as trustee) with fines amounting, at this point, to potentially tens of millions of dollars for challenging an offer to dedicate an easement that does not comply with the requirements set forth in *Nollan* and *Dolan*. Should this Court deny review in this case, few litigants will have either the financial wherewithal or the resolve to withstand such administrative intimidation in the future. This Court condemned the Coastal Commission's strong-arm tactics in *Nollan*; it should not blink at them now when the effect will be precisely the same, *viz.*, uncompensated takings of property.

Second, the decision below provides a clear roadmap that other States can use to escape the Court's holdings in *Nollan* and *Dolan*. Rather than employ direct extortion as in *Nollan*, government entities can use the "offer to dedicate" scheme to avoid paying for their takings. Most landowners will have little incentive to mount a takings challenge to a permit condition that coerces an offer to dedicate given (1) the remote likelihood that such an offer will ever affect the current landowner, and (2) the reality that any such challenge is unripe. Thus, the government can compel such offers with impunity, then wait years to implement the actual taking, and resist subsequent compensation claims based on the waiver and res judicata principles endorsed below. The resulting procedural whipsaw thus prevents the truly injured landowner

from challenging the real taking because no one acted in response to the largely trivial action taken earlier.

Finally, this case presents a particularly good vehicle for resolving an important issue affecting hundreds of coastal property owners. Petitioner's challenge to the unconstitutional taking committed by the County of Santa Barbara has been clearly and squarely presented from the outset of this litigation, and he has exhausted his state court remedies. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the promise of *Nollan* and *Dolan* completely illusory.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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June 3, 2002

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION SIX

[Filed Dec. 17, 2001]

JOSEPH L. COLE, as Trustee, etc.,
Plaintiff and Appellant,
v.
COUNTY OF SANTA BARBARA *et al.*,
Defendants and Respondents.

2d Civil No. B147339
(Super. Ct. No. 01003407)
(Santa Barbara County)

Joseph Cole, trustee for the Stanford Farms Trust, appeals from the judgment entered after the trial court granted a motion to dismiss and sustained a demurrer to the complaint he filed against respondents County of Santa Barbara and the Board of Supervisors. We affirm.

Procedural and Factual Background

In 1980, Francice Bushkin, the owner of a 25-acre parcel of real property in Santa Barbara, applied for a coastal development permit to add a sunroom and wooden deck to an existing guesthouse (a total of 570 square feet of improvements). At that time, the property was improved with a residence, stables, farmhands' quarters, barns, a guesthouse, and outbuildings. The improved part of the real property is separated from the beach by a 60-foot coastal bluff. On May 9, 1980, the California Coastal Commission approved

the permit, on the condition that Buskin record an offer, irrevocable for 21 years, to dedicate to the public a lateral access easement (77,000 square feet) running across the coastal side of the property. In May of 1982, Bushkin recorded the irrevocable offer to dedicate, the commission then issued the permit, and she constructed the sunroom and deck.

In 1987 and 1994, the United States Supreme Court issued decisions in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, and *Dolan v. City of Tigard* (1994) 512 U.S. 374, discussing the question whether a taking of private property without compensation occurs when a governmental entity requires an easement for public access as a condition for issuance of a construction permit. In *Nollan*, the court held that a taking occurs unless there is a substantial connection, or a "nexus," between the condition imposed on the use of the land and the adverse impact of the proposed improvement. (*Nollan*, at p. 837.) In *Dolan*, the court elaborated on the degree of connection that is required between the exactions imposed by the governmental entity and the adverse effects of the proposed development. Essentially, the governmental entity seeking to impose a development condition has the burden of proving that the "nature and extent" of the condition is "roughly proportionate" to the "nature and extent" of any adverse impact from the development. (*Dolan*, at p. 391.)

In 1995, the Stanford Farms Trust acquired Bushkin's property as a successor in interest. On October 6, 1998, the Santa Barbara County Board of Supervisors held a public hearing at which it was expected to accept numerous outstanding offers to dedicate public access easements. The trust's representative appeared at the hearing and objected to the proposed acceptance of the irrevocable offer to dedicate on the trust's property. The trust's representative argued the board's acceptance of the offer to dedicate would violate the constitutional rights of the trust's beneficiary under *Nollan*

and that acceptance of the offer could result in significant environmental impacts. Initially, the board delayed action on the offer to dedicate.

On October 16, 1998, Gregory Parker (the former trustee of the Stanford Farms Trust) recorded a Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement with the Santa Barbara County Recorder's Office. The notice stated that the offer to dedicate was revoked and rescinded on the grounds that acceptance of the offer would constitute an unconstitutional taking of property in violation of the constitutional rights of the owner, in direct contravention of the Fifth and Fourteenth Amendments to the United States Constitution and the Supreme Court decisions in *Nollan* and *Dolan*. The trust's attorney sent a letter to the board that same day advising that the trust had revoked the offer to dedicate.

On March 15, 1999, the Coastal Commission issued a "cease and desist" order, directing the trustee to cancel the Notice of Revocation and to refrain from engaging in any future activity inconsistent with the previously issued permit. In April of 1999, Parker objected to the cease and desist order and filed a complaint against the commission, seeking declaratory relief, rescission of the irrevocable offer to dedicate, and a writ of mandamus. That action was filed in Los Angeles County Superior Court and was later transferred to San Francisco County Superior Court.

In January of 2000, the San Francisco County Superior Court sustained the Coastal Commission's demurrer to Parker's first two causes of action based on principles of res judicata and waiver. Parker then unsuccessfully sought extraordinary relief in the Court of Appeal to set aside the order sustaining the demurrer. In March of 2000, Joseph Cole was substituted in the place of Parker as the successor trustee of the Stanford Farms Trust. The status of the San Francisco action is not clear from the record.

On February 15, 2000, the County accepted the irrevocable offer to dedicate on the trust's property through a resolution adopted by the Board of Supervisors. The trustee (Cole) objected and then initiated this action in April of 2000 against the County, seeking relief for a variety of claims. His amended complaint asserts ten causes of action, including declaratory and injunctive relief, rescission, quiet title, and inverse condemnation. These causes of action are all based on the allegations that (1) the County had accepted the offer to dedicate without showing the dedication was sufficiently related both in nature and extent to the impact of the owner's development as required by *Nollan* and *Dolan*; (2) the offer to dedicate was either void when made or became unenforceable after *Nollan* and *Dolan*; (3) the County acted under color of state law in accepting the offer; and (4) the County had violated the trust beneficiary's rights to procedural and substantive due process and equal protection. The amended complaint also included a petition for a writ of mandamus based on allegations that the County, by accepting the irrevocable offer to dedicate, had unconstitutionally taken the trust's property for public use without just compensation and had failed to comply with California's Environmental Quality Act (CEQA).[1]

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[1] The first three causes of action of the complaint are brought under 42 U.S.C. section 1983 and allege violations of substantive and procedural due process, and equal protection. The fourth and fifth causes of action seek a declaration under section 1983 and California Code of Civil Procedure section 1060 that acceptance of the offer to dedicate violated the Fifth and Fourteenth Amendments of the federal Constitution. The sixth cause of action alleges the County breached the implied covenant of good faith and fair dealing by purporting to accept the offer in violation of constitutional standards. The seventh and eighth causes of action petition the trial court for an administrative writ of mandamus. The ninth cause of action seeks to quiet title, and the tenth cause of action asserts a claim for inverse condemnation.

In October of 2000, the County filed a demurrer and a motion to dismiss the amended complaint, contending that the doctrines of waiver and res judicata precluded the trust from contesting the Coastal Commission's condition of approval placed on the 1980 permit. The County argued the trust's predecessor in interest had waived the right to challenge the permit condition by (1) complying with the condition and accepting the benefits of the permit; and (2) failing to challenge the condition through a timely petition for writ of administrative mandamus. The County further argued the trust lacked standing to challenge the irrevocable offer to dedicate because its predecessor in interest had relinquished the property interest, i.e., the right to the easement, in 1982 when the offer to dedicate was recorded. Finally, the County argued the CEQA claim was subject to mandatory dismissal because the trust had failed to (1) request a hearing within 90 days; (2) serve the petition within the required time period; and (3) comply with the 180-day statute of limitations.

In opposition, the trustee argued the County could not exercise its discretion and accept the irrevocable offer to dedicate in a manner contrary to public policy and the applicable constitutional standards. He argued the causes of action in his complaint were not barred by res judicata, waiver principles or the statute of limitations because he was not challenging the Coastal Commission's initial requirement of an offer to dedicate, but rather the "County's manner of acceptance of the [offer to dedicate], in the year 2000." Further, the trustee argued he had standing to bring the action because he was the owner, in trust, of the property against which the County recorded its Resolution of Acceptance, and the proposed use of the easement was inconsistent with the terms of the offer, applicable constitutional standards, and public policy. Finally, the trustee suggested the trial court should refuse to enforce the offer to dedicate on public policy grounds because it could not be accepted consistent with constitutional standards.

In December of 2000, the trial court sustained the demurrer to the entire complaint without leave to amend and granted the motion to dismiss on the grounds that (1) the claims were barred by res judicata; (2) the trustee could not challenge the validity of the conditions of a permit because the predecessor in interest had accepted the benefits of the permit and complied with the challenged permit conditions; (3) the trustee lacked standing to challenge the offer to dedicate because the predecessor in interest recorded the irrevocable offer and conveyed the property interest at issue; and (4) the CEQA claim was barred by the statute of limitations and by noncompliance with Public Resources Code sections 21167.4, subdivision (a), and 21167.6, subdivision (a).

Discussion

In reviewing the legal sufficiency of the trustee's complaint, this court must assume the truth of all factual allegations and determine whether "the facts alleged show entitlement to relief under any possible legal theory." (*Shaolian v. Safeco Ins. Co.* (1999) 71 Cal.App.4th 268, 271.) We review an order sustaining a demurrer de novo, exercising "independent judgment about whether the complaint states a cause of action as a matter of law." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Application of the Doctrines of Res Judicata and Waiver

The trustee primarily contends the trial court erred in concluding that his claims were barred by the doctrines of res judicata and waiver. He argues these doctrines are inapposite because he challenges the taking of the property interest by the County when it accepted the offer to dedicate, rather than the actions of the Coastal Commission in requiring the offer as a condition to issuance of the permit in 1980. In particular, the trustee argues that (1) an offer to dedicate does not convey title to an easement until such time as the public

agency agrees to accept the offer (see *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508; *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, 170); (2) he seeks compensation only for the value of the property interest taken as a result of the County's actions in accepting the offer to dedicate, a challenge brought within 60 days of the County's actions as required by Public Resources Code section 30802; and (3) the County has an independent duty to comply with the constitutional standards enunciated in *Nollan* and *Dolan* and accept the offer to dedicate only if it can do so consistent with its obligations under the Fifth and Fourteenth Amendments. We reject these contentions.

Under the California Coastal Act, an aggrieved property owner must file a petition for writ of administrative mandamus within 60 days to challenge the validity of an action taken by the Coastal Commission. (Pub. Resources Code, § 30801.) Here, the amended complaint alleges that the commission issued the coastal development permit requiring the irrevocable offer to dedicate in May of 1980. The trustee concedes that Bushkin, the original permittee and property owner at that time, never filed an action challenging the commission's 1980 permit decision. The commission's decision, therefore, became final in 1980. As the County observes, well established principles of collateral estoppel and res judicata preclude the trustee, as the predecessor in interest, from relitigating the validity of the commission's decision or seeking alternative forms of relief therefrom.

For example, in *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488 (hereafter *Ham*), the Coastal Commission required a coastal property owner to record an offer to dedicate an easement for public access across the strip of beach in front of his home, in return for approval of a coastal development permit. In 1985, the landowner recorded the offer to dedicate, the commission issued the permit, and the landowner completed the project. Three years later,

following the decision in *Nollan*, the landowner sued the commission for inverse condemnation seeking $1 million in damages. He alleged the permit condition requiring dedication of a public beach access easement amounted to an unconstitutional taking of private property without compensation. The Court of Appeal issued a writ directing the trial court to sustain the commission's demurrer to the complaint, concluding that the landowner's failure to challenge the permit condition in an administrative mandamus action barred his action for damages. The court reasoned: "The primary right at issue in the administrative proceeding was Ham's right not to have his private property taken by the government for public purposes without compensation. That is the same primary right he asserts in his inverse condemnation action, although he now seeks a different type of relief." (*Id.* at p. 1499.) The court added that the validity of the permit condition was at issue in the prior administrative proceeding. "Because Ham failed to contest the validity by the means provided for judicial review, he is now estopped to relitigate the same issue in the context of an inverse condemnation action." (*Id.* at p. 1500, fn. 8.)

The *Ham* court further held that as long as an agency has subject matter jurisdiction over the issue before it, its decisions are subject to res judicata even if they turn out to be incorrect. "'It is an established rule that where a tribunal has jurisdiction of the parties and of the subject-matter it necessarily has the authority and discretion to decide the questions submitted to it even though its determination is erroneous. . . . This rule applies to quasi-judicial tribunals as well as to courts.'. . . Here, the commission quite clearly had subject matter jurisdiction and the authority to impose permit conditions reasonably related to any burdens on the public beach created by the construction of Ham's residence. . . . The fact that it incorrectly analyzed the relationship between the burdens and the condition it sought to impose—or perhaps more accurately, incorrectly anticipated the action of

the United States Supreme Court—does not mean it acted in excess of its jurisdiction in the fundamental sense. If he believed the commission was wrong, Ham had a remedy by way of judicial review. Having failed to avail himself of that recourse, he now has no basis for complaint." (*Ham, supra*, 210 Cal.App.3d at p. 1501, citations & fn. omitted.)

Similarly, in *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642, a landowner challenged various conditions that the Coastal Commission imposed on a coastal development permit issued in 1985, including the dedication of 200 acres of open space. Like the instant case, the landowner failed to timely petition to invalidate the conditions, accepted and complied with them, and recorded the offer to dedicate. Following *Nollan*, the landowner sued the commission, alleging claims for inverse condemnation, due process and civil rights violations, declaratory relief, and injunctive relief. The Court of Appeal held the doctrines of waiver and res judicata barred the landowner's claims and rendered them subject to a demurrer. "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit." (*Id.* at p. 654). The court added: "Regardless of whether [the landowner] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." (*Id.* at p. 660.)

Similarly, in *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, the Coastal Commission issued permits to two landowners for development in the Malibu area within the coastal zone. As a condition of the permit, the commission required the landowners to record

development restrictions on other building sites in the coastal zone, including a dedication of a scenic easement. The permittees complied and recorded the restrictions on development on the other lots. A subsequent owner of the restricted lots then filed an administrative mandamus petition and a complaint for damages against the commission. The action attacked the declarations of restrictions on various constitutional and statutory grounds. The trial court sustained the commission's demurrer to the complaint and writ petition on the ground that the action was barred by the statute of limitations and the doctrine of waiver. The Court of Appeal affirmed: "It is well settled that a landowner who claims that a permit condition imposed by the Commission constitutes a taking must first establish the invalidity of the condition by way of a timely petition for a writ of administrative mandamus. Failure to file such a timely petition results in waiver of any inverse condemnation and related claims." (*Id.* at p. 524.) The appellate court also noted that Public Resources Code section 30801 required that challenges to the development permits be made within 60 days of issuance of the permit, the landowners were aware of the restrictions when they purchased the property, and the declarations of restrictions ran with the land and bound them "even though they were not parties to the deed restrictions." (*Id.* at p. 526.)

Finally, in *Patrick Media Group, Inc., v. California Coastal Com.* (1992) 9 Cal.App.4th 592, an owner of billboards brought an inverse condemnation action against the Coastal Commission based on a coastal development permit which required removal of three billboards before construction of a proposed hotel could begin on the property. The Court of Appeal held the owner's failure to challenge the discretionary administrative action in an administrative mandamus proceeding rendered the administrative action immune from collateral attack, either by inverse condemnation action or by any other action. The court reasoned that this general rule applied whether the challenge was that the

administrative decision was invalid and should be canceled, or that the decision resulted in a taking of property for public use without compensation. "In either case, the essential underpinning of the challenge is the invalidity of the administrative action." (*Id.* at p. 608.) The court elaborated upon the policy considerations underlying application of this general rule: "An agency's interest in prompt notice of a challenge to its decisions is, after all, equally great, whether the party raising that challenge is a landowner, a permit applicant, or any other party. . . . Once aware of a challenge from whatever source, an agency can cancel, change, or stay enforcement of a challenged action, or otherwise mitigate damages. On the other hand, if persons affected by adverse administrative actions—be they landowners, permit applicants, or others—were permitted to refrain from challenging such actions until mitigation of damages by the government becomes impossible through the passage of time or events, and then present monetary claims, the financial burden on government could become overwhelming." (*Id.* at pp. 612-613, citation omitted.)

Like the appellate courts in *Ham, Rossco, Ojavan*, and *Patrick Media*, we conclude the irrevocable offer to dedicate in this case is immune from collateral attack and that the causes of action set forth in the trustee's amended complaint are barred by the doctrines of res judicata and waiver. Bushkin, the trustee's predecessor in interest, chose not to challenge the Coastal Commission's permit condition in an administrative mandamus proceeding. The 1980 permit decision has, thus, become final and cannot be collaterally attacked through any of the claims alleged in the trustee's amended complaint. Moreover, the trustee's predecessor in interest complied with the permit condition, improved the property, and accepted the benefits of the permit. The permit "runs with the land" and the trust beneficiary has succeeded to the benefits enjoyed under the permit issued Bushkin. The trustee cannot now challenge the condition placed on issuance

of that permit. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511 ["a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit"]; *Ojavan Investors, Inc. v. California Coastal Com., supra*, 26 Cal.App.4th at p. 528; *Rossco Holdings, Inc. v. State of California, supra*, 212 Cal.App.3d at pp. 654-655.)

We reject the trustee's contention that the causes of action alleged in his complaint attack only the County's action in accepting the irrevocable offer rather than the Coastal Commission's 1980 administrative permit condition. The validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint. This is illustrated by the trustee's Notice of Revocation, incorporated by reference into the amended complaint, stating that there is no "rough proportionality between the adverse impact of the improvement and the adverse impact of the Permit Condition"; the "exaction imposed by the Permit Condition is unconstitutional, unlawful, and in violation of public policy"; and there was "no consideration for the Permit Condition." The current claims are derived from and dependent upon the original permit condition the predecessor in interest failed to timely challenge. To allow the instant challenge to the permit condition would circumvent the system of review provided under Code of Civil Procedure section 1094.5, undermine the authority of the administrative hearing process, waste administrative and judicial resources, and render the administrative hearings "nothing more than perfunctory gestures." (*Patrick Media Group, Inc., v. California Coastal Com., supra*, 9 Cal.App.4th at p. 613.)

The trustee contends that even if California law does not expressly provide a cause of action for the claims asserted in his complaint, federal law does. He argues that under 42

U.S.C. section 1983, any person may challenge local government actions that violate rights guaranteed under the federal Constitution.[2] The federal claim is barred by the doctrine of res judicata as well. (See, e.g., *Rossco Holdings, Inc. v. State of California, supra*, 212 Cal.App.3d at p. 660 [state procedural rules bar substantive due process claim].)

Finally, we reject the trustee's contention that his claims were not ripe until the County actually accepted the irrevocable offer to dedicate because the property interests in the land underlying the easement were not extinguished until then. *Palazzolo v. Rhode Island* (2001) 533 U.S. ___ [150 L.Ed.2d 592], cited by the trustee for this proposition, is inapposite.

In that case, Palazzolo and several associates owned commercially valuable waterfront property, which Rhode Island designated as coastal wetlands. In 1971, a state agency was created to protect the coastal property and it adopted restrictive land use regulations, designating properties such as Palazzolo's as wetlands and limiting their development. Several years after the promulgation of the restrictive legislation and regulations, Palazzolo became the sole owner of the property. He then filed applications with the state agency for permission to develop most of his wetland property and to fill about two-thirds of the property. The state agency denied the applications and Palazzolo unsuccessfully sought judicial review of the agency's decision. Palazzolo then filed an inverse condemnation suit in state court, claiming the wetland regulations, as applied to his property, violated the Fifth

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[2] 42 U.S.C. section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Amendment Takings Clause. The Rhode Island Supreme Court held that his taking claim was not ripe, he lacked standing to challenge regulations predating his ownership of the property, and his claim that he was deprived of all economically beneficial use of the property was contradicted by the evidence. The United States Supreme Court reversed the first two holdings above, holding that his taking claim was ripe because the state agency had denied multiple applications for development and he had standing to challenge the wetland regulations. The court further held that the postregulation acquisition of title was not fatal to the taking claim. "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." (*Palazzolo v. Rhode Island, supra*, 533 U.S. at p. ___ [150 L.Ed.2d at p. 613].)

Palazzolo does not address the situation, such as that presented here, where the predecessor in interest acquiesced in the restriction and accepted the benefits. The County does not contend that the trustee's taking claim is barred because the trust had notice of regulatory laws in effect at the time it acquired the property. Rather, the County contends the taking claim is barred because the trust acquired the property subject to an explicit recorded offer of dedication in which the prior landowner conveyed away the very property interest at stake—the right to exclude the public from the property.

In light of our conclusion above that the doctrines of res judicata and waiver bar the claims asserted in the amended complaint, we need not reach the question whether the trustee had standing to bring the action.

The CEQA Claim (Eighth Cause of Action)

The trustee next contends the trial court erred in dismissing his CEQA claim. We disagree. The cause of action is barred by the statute of limitations set forth in Public Resources Code section 21167, subdivision (d), which requires any person wishing to challenge an agency's decision to do so within 180 days of approval of the project. The Coastal Commission approved the permit condition in 1980, stating that the development project would not have any "significant adverse impact upon the environment." Under CEQA guidelines, the term "project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (3) An activity involving the issuance to a person of a . . . permit . . . or other entitlement for use by one or more public agencies." (CEQA Guidelines, § 15378, subd. (a).) "Project" refers "to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (CEQA Guidelines, § 15378, subd.(c).) A project is "approved" when the agency makes a decision that "commits the agency to a definite course of action in regard to a project intended to be carried out by a person." (CEQA Guidelines, § 15352, subd. (a).) For private projects, "approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary . . . permit . . . or other entitlement for use of the project." (CEQA Guidelines, § 15352, subd. (b).)

As the County observes, the public access easement in this case was specified as a condition to issuance of the 1980 permit, the Coastal Commission determined the permit would not issue in the absence of the condition, and the commission found that the project did not have any significant adverse environmental impact. Acceptance of the irrevocable offer to

dedicate was a foreseeable implementation of the original project approved in 1980. The trustee does not allege that the County has taken any steps to expand the scope of the intensity of the easement. The instant action should have been filed, thus, within 180 days of issuance of the permit. In light of this conclusion, we need not determine whether the CEQA claim was subject to dismissal for noncompliance with the hearing and service requirements of Public Resources Code sections 21167.4, subdivision (a), and 21167.6.

The judgment is affirmed.[3] Costs are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

---

[3] In a supplemental opening brief, the trustee argues for the first time on appeal that the Coastal Commission, because of its appointive structure, is an improperly constituted executive agency and that its issuance of the conditional permit in this case violated the doctrine of separation of powers. The trustee suggests, therefore, that the County cannot rely in accepting the irrevocable offer to dedicate upon the commission's action. We decline to reach the issue raised for the first time on appeal. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 570.)

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA
(ANACAPA DIVISION)

[Filed Dec. 13, 2000]

Case No. 01003407

JOSEPH L. COLE, TRUSTEE OF THE
STANFORD FARMS TRUST,
Plaintiff-Petitioner,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF
SANTA BARBARA; COUNTY OF SANTA BARBARA;
and DOES 1 through 50 inclusive,
Defendants-Respondents.

[~~PROPOSED~~] ORDER ON COUNTY'S DEMURRER AND
MOTION TO DISMISS COMPLAINT AND PETITION

Date: November 21, 2000
Time: 9:00 a.m.
Dept: 3

Assigned For All Purposes to the
Honorable Thomas P. Anderle

On November 21, 2000, the Court conducted a hearing on the demurrer of the County of Santa Barbara ("County"), in which the Board of Supervisors of the County of Santa Barbara is deemed to have joined, to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of action, and motion to dismiss the California Environmental Quality Act ("CEQA") cause of action (eighth), of the First Amended Complaint and Petition for Writ of Mandamus ("Complaint").

Plaintiff/Petitioner Joseph L. Cole, as Trustee of the Stanford Farms Trust ("Plaintiff") was represented by K. Andrew Kent and Mark Haddad; Respondent County was represented by Deputy County Counsel William M. Dillon. Also appearing for County was Kelly A. Casillas. The Court, having read and considered all matters previously submitted, as well as argument of counsel, finds and IT IS HEREBY ORDERED as follows:

1. The demurrer of County as to all causes of action of Plaintiff's Complaint is sustained without leave to amend on the grounds that: (a) the claims are barred by res judicata because a person may not challenge the validity of the conditions of a permit without having filed a timely petition for writ of administrative mandamus to contest the permit conditions now being challenged; (b) the claims are barred by waiver because a party may not challenge the validity of the conditions of a permit where its predecessor-in-interest accepted the benefits of the permit and complied with the challenged permit conditions; and (c) Plaintiff has no standing to challenge the offer to dedicate because, when his predecessor recorded the irrevocable offer to dedicate, she conveyed the property interest that Plaintiff now claims to own.

2. The eighth cause of action is also subject to demurrer because the claim is barred by the statute of limitations of Public Resources Code section 21167 (Code of Civ. Pro. § 430.10(e)).

3. The motion to dismiss of County is granted as to Plaintiff's eighth cause of action on the grounds that: (a) Plaintiff failed to comply with Public Resources Code 21167.4(a) that requires Plaintiff to request a hearing on the writ within 90 days of filing the action; and (b) Plaintiff failed to serve County with Notice of Commence-

ment of Action and Notice to Prepare the Administrative Record required by Public Resources Code section 211.67.6(a).

Dated: December 12, 2000.

/s/ Thomas P. Anderle
THOMAS P. ANDERLE
Judge of the Superior Court
County of Santa Barbara

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed Mar. 13, 2002]

JOSEPH L. COLE, as Trustee, etc.,
Plaintiff and Appellant,

v.

COUNTY OF SANTA BARBARA,
Defendant and Respondent.

Court of Appeal, Second Appellant District,
Division Six—No. B147339
S103930

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

/s/ GEORGE
Chief Justice

(2)
Supreme Court U.S.
FILED
AUG 2 2002
OFFICE OF THE CLERK

No. 01-1773

In The
Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,

Petitioner,

v.

COUNTY OF SANTA BARBARA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF IN OPPOSITION

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August 2002

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QUESTION PRESENTED

Whether a landowner, who knowingly acquired property that was subject to an irrevocable offer to dedicate a public access easement that his predecessor in interest voluntarily recorded in 1982, may claim that an agency's acceptance of the offer of dedication in 1999 constitutes a "taking" where the landowner's predecessor failed to challenge the permit condition requiring the offer of dedication and where both landowners have enjoyed the benefits of the permit for the past twenty years?

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INTRODUCTION

This petition is the latest in the series of actions by the owner of a 25-acre coastal estate who seeks to avoid the legal obligation to provide public access that his predecessor in interest voluntarily assumed twenty years ago when she accepted the benefits of a coastal development permit. The current landowner, Joseph Cole, trustee of the Stanford Farms Trust, requests that the Court review the *unpublished* decision of a California court of appeal rejecting Cole's claim that Santa Barbara County's acceptance of an irrevocable offer of dedication that was conveyed by his predecessor constituted a "taking." Cole's petition presents no issue worthy of this Court's review:

- The California court's decision rests on adequate and independent state law grounds because, under California law, the doctrines of res judicata and waiver bar a successor landowner from collaterally attacking permit conditions where the predecessor landowner did not challenge the permit condition but instead voluntarily complied with the permit condition and accepted the benefits of the permit. *See, e.g., California Coastal Comm'n v. Superior Court ("Ham"),* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567, (Cal.App. 1989); *Rossco Holdings, Inc. v. State of California,* 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990).

- Even if the lower court's decision is treated as the disposition of a federal claim, the petition should be denied. There is no conflict among the courts, because both state and federal courts have found that a landowner may not collaterally attack an offer of dedication required as a permit condition after the statute

of limitations has expired and where the landowner has obtained the benefits of the permit. *E.g., Ham, Daniel v. County of Santa Barbara,* 288 F.3d 375 (9th Cir. 2002), *pet. for cert. filed,* July 18, 2002.

- The California Court of Appeal's unpublished decision does not present an important issue of federal law; it simply resolves Cole's idiosyncratic "dual taking" theory that a landowner has the right to file a taking claim challenging the imposition of a permit condition requiring an irrevocable offer of dedication and then another taking claim after the irrevocable offer has been accepted. That a few landowners in the future may choose to bring similar untimely challenges to the acceptance of irrevocable offers of dedication does not transform Cole's claim into an important federal issue.

- Even putting aside that Cole's taking claim is barred by res judicata and waiver, Cole's taking claim based on the County's acceptance of the irrevocable offer is meritless, because it is based on a misunderstanding of California law regarding property dedications. Once a landowner records an irrevocable offer of dedication, his ability to exclude the public terminates upon acceptance of the offer. Cole, as a successor in interest, has no greater property rights than what his predecessor conveyed to him. See *Ojavan Investors v. California Coastal Comm'n,* 26 Cal.App.4th 516, 528, 32 Cal.Rptr. 103, (Cal.App. 1994), *cert. denied,* 513 U.S. 1148 (1995). Because Cole's predecessor had no right to object to the County's

acceptance of the irrevocable offer of dedication, neither did Cole.

Cole's petition for a writ of certiorari should be denied.

JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution and 28 U.S.C. section 1257 to review the judgment of the California Court of Appeal because that decision is based on adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cole's petition for a writ of certiorari fails to present any federal question because the California state courts decided this case on adequate and independent state law grounds.

STATEMENT OF THE CASE

In 1980 Francice Bushkin, then the owner of the property, applied to the California Coastal Commission for a coastal development permit to add a sunroom and deck to an existing guesthouse. Pet. App. at 1a-2a. On May 9, 1980, the Coastal Commission approved the permit. *Id.* The permit contained a condition requiring that Bushkin record an irrevocable offer to dedicate to the public a lateral access easement running across the coastal side of the property, which is separated from the improved part of

the real property by a 60-foot bluff. *Id.* In May 1982 Bushkin recorded the irrevocable offer of dedication and constructed the sunroom and the deck. *Id.* Bushkin did not file a legal action or otherwise challenge the permit condition. Nor is there any evidence or allegation that Bushkin believed that she was "coerced" when she complied with the permit condition.

In October 1995, the Stanford Farms Trust acquired the subject property as Bushkin's successor in interest. *Id.* The Trust has never denied that it was aware of the recorded offer of dedication when it acquired the property. On October 6, 1998, the Santa Barbara County Board of Supervisors held a public hearing to consider the acceptance of several outstanding irrevocable offers to dedicate public access easements. *Id.* A representative of the Trust appeared at the hearing and objected. On October 16, 1998, Gregory Parker, then the trustee of the Trust, recorded a document entitled "Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement." *Id.* at 3a. This document recited Parker's objection to the 1980 permit condition and stated that the offer to dedicate had been revoked and rescinded. *Id.*

On March 15, 1999, the Coastal Commission issued a "cease and desist" order, directing the Trust to cancel the Notice of Revocation. *Id.* In April 1999 Parker filed an action in San Francisco superior court against the Coastal Commission, objecting to the cease and desist order by seeking declaratory relief, rescission of the irrevocable offer to dedicate, and a writ of mandamus. *Id.* The Coastal Commission filed an answer and a cross complaint for violation of the cease and desist order. On January 3, 2000, the trial court issued an order that sustained the Coastal Commission's demurrer to the first two causes of

action of Parker's complaint without leave to amend on the grounds that the claims were barred by the doctrines of res judicata and waiver. *Id.* The California Court of Appeal denied Parker's petition for a writ of mandate to set aside the trial court's order. *Parker v. California Coastal Comm'n*, Cal.Ct.App. No. A090010. The California Supreme Court denied Parker's petition for review. Order of April 26, 2000.[1]

On February 15, 2000, after the Trust's defeat in the *Parker* case, County accepted the irrevocable offer of dedication. In April 2000, Joseph Cole (the Trust's new trustee) filed an action against the County (but not the Coastal Commission) in Santa Barbara County superior court. Pet. App. at 4a. This action challenges the legality of the very same irrevocable offer of dedication that the trial court in *Parker* upheld when it sustained the Coastal Commission's demurrer. In December 2000 the Santa Barbara trial court sustained County's demurrer without leave to amend. *Id.*

---

[1] Following the California Supreme Court's action, the trustees then contended that the Commission's enforcement action was an improper Strategic Lawsuit Against Public Participation under California Code of Civil Procedure section 425.16. The trial court rejected this claim and, in an unpublished decision, the California Court of Appeal upheld the trial court's decision, finding that the Commission had established a prima facie showing that it would prevail in its enforcement action. *Cole v. California Coastal Comm'n,* Cal.Ct.App. No. A091220, Sept. 2, 2001. Following Cole's filing of this petition for a writ of certiorari, Cole settled his enforcement action with the Commission by rescinding the Notice of Revocation and paying $460,000. The resolution of the Commission's enforcement action did not address Cole's ability to pursue his claim against County.

On appeal, the California Court of Appeal rejected Cole's claims in an unpublished opinion. Pet. App. A. Relying on California state law, the court of appeal found that Cole's claims were barred by the doctrines of res judicata, collateral estoppel, and waiver. With regard to res judicata and collateral estoppel, the court held:

> Under the California Coastal Act, an aggrieved property owner must file a petition for writ of administrative mandate within 60 days to challenge the validity of an action taken by the Coastal Commission. (Pub. Resources Code § 30801.) Here, the amended complaint alleges that the commission issued the coastal development permit requiring the irrevocable offer to dedicate in May of 1980. The trustee concedes that Bushkin, the original permittee and property owner at that time, never filed an action challenging the commission's 1980 permit decision. The commission's decision, therefore, became final in 1980. . . . well established principles of collateral estoppel and res judicata preclude the trustee, as the predecessor in interest, from relitigating the validity of the commission's decision or seeking alternative forms of relief therefrom.

Pet. App. at 7a.

The court of appeal also rejected Cole's theory that he was simply attacking County's acceptance of the permit rather than the original permit issued by the California Coastal Commission. The court found that "the validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint." *Id.* at 12a. The court noted that the trustee's Notice of Revocation, which was incorporated into the amended complaint,

directly challenged the validity of the original permit through its assertion that the "exaction imposed by the Permit Condition is unconstitutional . . . " *Id.*

The California Supreme Court then denied Cole's petition for review. See Pet. App. at 20a. His petition for a writ of certiorari to this Court followed.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

A. This Court Will Not Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds.

This Court has repeatedly stated that it has no jurisdiction to review judgments of state courts that rest upon separate, adequate and independent state law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Murdock v. Memphis,* 87 U.S. 590, 636 (1875). This rule has been applied frequently, and includes the situation in which application of a state law period of limitations for asserting a property interest would bar assertion of a federal constitutional claim. See *Paschall v. Christie-Stewart,* 414 U.S. 100 (1973).

B. The Court of Appeal's Decision Is Based on California Law Barring a Landowner from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition.

Under California law, a claim for inverse condemnation arising from an administrative action must be filed within the same period of limitations as the administrative mandamus claim. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 1056-57, 32 Cal.Rptr.2d 244, 257-258 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Under the California Coastal Act, an aggrieved person must file a petition for a writ of administrative mandate within 60 days of the Coastal Commission's permit decision. Cal. Pub. Resources Code, § 30801. If a landowner fails to file a timely challenge, the Coastal Commission's permit decision becomes final, and the application of state law principles of res judicata and collateral estoppel renders the Commission's decision "immune from collateral attack, either by inverse condemnation action or by any other action." *Patrick Media Group, Inc. v. California Coastal Comm'n,* 9 Cal.App.4th 592, 608, 11 Cal.Rptr.2d 824, 833 (Cal.App. 1992).

Applying this rule, the California courts repeatedly have rejected collateral attacks on permit conditions, including public access conditions, where the time for properly challenging the Commission's decision has long since passed. See *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989) (rejecting collateral attack on access condition where landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco Holdings,* 212 Cal.App.3d 642, 260

Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990) (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors,* 26 Cal.App. 4th 516, 32 Cal.Rptr. 103 (Cal.App. 1994), *cert. denied,* 513 U.S. 1148 (1995) (failure to timely challenge permit conditions renders them immune from collateral attack by successor in interest). The California court of appeal relied on these cases in determining Cole's claim had no merit. Pet. App. 7a-12a.

In this case, the original permittee, Bushkin, never filed an action challenging the Coastal Commission's 1980 permit decision. As a result, under California law, Cole's current challenge to the 1980 permit condition is barred by the statute of limitations and doctrine of res judicata. The court of appeal's decision therefore was based on an independent and adequate state law ground requiring rejection of Cole's petition.

C. The Court of Appeal's Decision Is Also Based on California's Law of Wavier

Cole's collateral attack on the 1980 permit conditions is also barred under California's waiver doctrine. Under this doctrine, a challenge to a permit condition by a landowner or his successor in interest is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal,* 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138 Cal.Rptr. 472, 474-75 (Cal.), *app. dismissed,* 434 U.S. 944 (1977). California courts frequently have applied this rule against collateral attacks on permit conditions. *Rossco Holdings,* 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742

(waiving challenge to access condition by receiving benefits of permits and by complying with condition); see *Ojavan Investors, Inc.*, 26 Cal.App.4th at 527-28, 32 Cal.Rptr.2d at 110; *City of Santee v. Superior Court*, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (Cal.App. 1991); *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (Cal.App. 1977).

Applying this state law rule, the court of appeal in this case determined that the "permit 'runs with the land' and the trust beneficiary has succeeded to the benefits of the permit issued [to] Bushkin. The trustee cannot now challenge the condition placed on issuance of that permit." Pet. App. 11a-12a. Consequently, California's waiver doctrine constitutes another independent and adequate state law ground requiring rejection of Cole's petition.

D. Cole Cannot Avoid the Application of These State Law Principles by Arguing That the Offer of Dedication Required by the 1980 Permit Condition Would Not Meet the Standards Contained in *Nollan*.

As one way of avoiding application of these rules, Cole suggests that the offer to dedicate is unenforceable because the requirement for public access contained in the 1980 permit condition could not meet the requirements later set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Pet. at 11.

Under California law, the state courts have explicitly rejected this attempt to evade the state law of res judicata and waiver. Thus, in *Rossco Holdings* the court found that *Nollan* did not involve a situation – such as this one – where the landowner accepted and complied with the

permit conditions. *Rossco Holdings,* 212 Cal.App.3d at 654-655, 260 Cal.Rptr. at 742. Similarly, the court in *Ham* rejected the argument that *Nollan* prevented application of the res judicata doctrine, finding that it would not have been futile for Ham to file a challenge to the Commission's permit condition because the law at the time was not clear regarding the legality of the condition. *Ham*, 210 Cal.App.3d at 1497-1499, 258 Cal.Rptr. at 570-573.

Regardless of whether a challenge in 1980 would have been futile, "the res judicata consequences of a final, unappealed judgment on the merits [is not altered] by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.* at 1498 (*citing Reed v. Allen*, 286 U.S. 191, 201 (1932)); see, *e.g., Jolly v. Eli Lilly & Co.* 44 Cal.3d 1103, 1116-1117, 245 Cal.Rptr. 658, 665 (Cal. 1988) ("a change in the law . . . does not revive claims otherwise barred by the statute of limitations"). The federal rule on this point is the same. *Federated Department Stores v. Moitie,* 452 U.S. 394, 398-399 (1981). Consequently, even if *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) would have required a different result today, state law principles of res judicata do not allow Cole to relitigate the validity and constitutionality of the 1980 permit condition.[2]

---

[2] Cole improperly intimates that this Court in *Nollan* struck down the Commission's entire access program and that a dedication of access is per se illegal. See Pet. at 2. *Nollan,* however, confirmed that regulatory agencies may exact property as conditions for development permits as long there is a "nexus" between the impacts of the project and the permit condition. See *Nollan,* 483 U.S. at 836-837 (describing situations in which access conditions are permissible).

II. EVEN IF IT IS NOT BARRED ON INDEPENDENT STATE LAW GROUNDS, COLE'S PETITION SHOULD BE DENIED

Even if Cole's petition was not precluded by these independent and adequate state law grounds, the petition should be denied.

A. Cole's Petition Does Not Require the Court to Resolve a Conflict Among the Lower Courts.

First, Cole does not present any issues which require that the Court resolve a conflict among decisions of the lower courts. Both the California and federal courts addressing the issue have agreed that landowners may not collaterally attack permit conditions requiring the dedication of property long after the permit was approved and the offer of dedication recorded. *Ham; Rossco Holdings*; *Daniel*; see *Leroy Land Development Co. v. Tahoe Regional Planning Agency*, 939 F.3d 696, 698-699 (9th Cir. 1991).

B. Cole's Petition Does Not Present An Important Issue of Federal Law.

Nor does Cole present an important issue of federal law. His claim is predicated on his "dual taking" theory – that the imposition of a permit condition requiring an offer of dedication constitutes one taking and that the acceptance of the irrevocable offer of dedication, is a second, "legally distinct taking." Pet. at 13. Cole, however, does not point to any reported decision, treatise, law review article

or other legal source in which this peculiar theory has ever been mentioned, much less litigated.[3] Moreover, the court of appeal's decision is not published and lacks the force of stare decisis. See Cal.Ct.Rule 977(a). Far from raising any precedential constitutional issues, this is an eccentric action by a disgruntled landowner unwilling to abide the consequences of purchasing property that he knew was subject to an irrevocable offer of dedication at the time of purchase.

Perhaps realizing how isolated his claim is, Cole refers to the "literally hundreds of other offers that the Coastal Commission coerced before this Court's decision in *Nollan*." Pet. at 18. Cole is presumptuous in acting as the spokesman for other landowners. Unlike Cole, some landowners may accept the consequences of their voluntary decision to enjoy the benefits of their development permit in exchange for recording an irrevocable offer of dedication. Other landowners, having knowingly purchased their property subject to a recorded offer of dedication, may not see themselves as "coerced" landowners. Still others may actually support public access to the California coast, especially when they themselves will obtain the reciprocal benefits of similar access easements elsewhere in the State. That a few of these landowners eventually may raise untimely objections to the acceptance of an irrevocable offer of dedication does not elevate Cole's claim to the level of an important federal issue, especially when

---

[3] Cole omits to mention *Daniel*, the one reported decision in which a landowner claimed that an acceptance of an offer of dedication is a "taking."

these claims are premised on a mistaken view of California real property law. See *infra* at IIC.[4]

Cole also asserts that the Court should grant the petition to prevent the "strong-arm tactics" of the Coastal Commission when it seeks to enforce a permit condition requiring an offer of dedication. Pet. at 19. When landowners such as Cole accept the benefits of a permit and then unilaterally seek to revoke the conditions imposed on the permit, the Coastal Commission acts responsibly in enforcing the law. And, as Cole neglects to mention, the California court of appeal in Cole's San Francisco action ruled that the Coastal Commission stated a prima facie violation of the Coastal Act based on the Trust's attempted revocation of the offer of dedication. *Supra* at 4 n.3. That Cole since has agreed to pay $460,000 in settlement of the enforcement action further undermines the honesty of his attack on the Coastal Commission's propriety in enforcing the law. *Id.*

Finally, Cole argues that the Court should grant the petition because landowners have "little incentive" to contest the initial offer of dedication, thereby encouraging governments to use the offer of dedication "scheme" to circumvent the requirements of *Nollan*. Pet. at 19. This assertion is incredible. Cases such as *Hensler, Ham, Rossco,* and *Patrick Media* for years have provided landowners notice that they are legally required to bring a challenge to a permit condition when the condition is first

[4] Indeed, of the 72 outstanding offers to dedicate accepted by County, see Pet. at 4, only two landowners (Cole and Daniel) have chosen to challenge County's acceptance.

imposed, and cases such as *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) give the permittee every incentive to challenge the imposition of the original permit condition if government oversteps its authority. Notwithstanding Cole's empty claims of "coercion" and "extortion," there is no reason to create a new constitutional rule that would allow landowners to challenge the acceptance of irrevocable offers of dedication many years after they have accepted permit conditions and enjoyed the benefits of the permit. See *Leroy Land Development Co.*, 939 F.3d at 698-699 (challenge to settlement agreement imposing conditions of development five years after execution, based on a subsequent takings analysis articulated in *Nollan*, rejected because it " . . . would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind").

C. Cole's Taking Claim Is Meritless

In any event, Cole's underlying taking claim is meritless, even putting aside that it is barred by res judicata and waiver. Cole's claim that the County's acceptance of an irrevocable offer of dedication constitutes a separate compensable taking is founded on a mistaken understanding of the property "right" retained by a landowner after the landowner has recorded an irrevocable offer of dedication. As Cole properly concedes, the property interest claimed to be taken must be measured by state real property law. Pet. at 11. In Cole's view of California law, the landowner has a "legally distinct" interest for which he may assert a taking claim after an offer of dedication is accepted. Pet. at 10, 12.

There are at least two problems with this argument. First, the court of appeal concluded upon its review of the record that Cole's taking claim was founded on a challenge to the original permit because "the validity of the permit condition underlies all of the causes of action" alleged in the complaint. Pet. at 12a. The state court's interpretation of the pleadings is in effect a factual finding that rejects Cole's claim that his taking claim was directed solely at the County's acceptance of the offer of dedication.

Second, even if one chooses to disregard the state court's review of the record, Cole's theory that the County's acceptance of an irrevocable offer of dedication is a separate taking is based on his misreading of California real property law. Once the landowner records an irrevocable offer of dedication, he has conveyed away the right to exclude the public should the irrevocable offer ever be accepted and opened to the public. In this case, for example, the irrevocable offer granted by Cole's predecessor states that:

> "This Offer shall run and burden the Property and all obligations, terms, conditions, and restrictions hereby imposed shall be deemed to be covenants and restrictions on the use of the Property *from the date of recordation of this document and shall bind the Grantor and all successors and assigns.* This Offer shall benefit the State of California"

and

> "This irrevocable offer shall be binding for a period of 21 years. *Upon recordation of an acceptance of this Offer by the Grantee, this Offer and terms, conditions, and restrictions shall have the effect of a grant of easement in gross and perpetuity*

> *that shall run with the land and be binding on the parties, heirs, assigns, and successors."*

2 JA 327, 328 (emphasis added).

Therefore, although the landowner may have the qualified right to exclude others while the irrevocable offer of dedication is outstanding, that right is subject to immediate extinction once the agency accepts the offer. A public agency's acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right; it is the public's exercise of a right that the landowner explicitly conveyed away when he made the irrevocable offer of dedication. See, *e.g., Ojavan Investors,* 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110 (finding that prior landowner had waived right to challenge deed restrictions by having accepted the benefits of the permit and that current landowner can take "only the title [the prior owner] had and subject to prior recorded instruments").

As the Ninth Circuit found in *Daniel,* under both federal and California law, an irrevocable offer of dedication is like an option, and the taking of an option occurs when the option is granted, not when it is exercised. *Daniel,* 288 F.3d at 383; see *Palo Alto Town & Country Village, Inc. v. BBTC Co.,* 11 Cal. 3d 494; 502, 521 P.2d 1097, 1102, 113 Cal. Rptr. 705 (Cal. 1974) (the making of an option is an "irrevocable offer"); *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 772, 773, 192 P.2d 949, 952 (Cal.), *cert. denied*, 335 U.S. 944 (1948) (an "option contract gives the optionee a right against the optionor for performance of the contract . . . which the optionor cannot defeat by repudiating the option"). Thus, when County accepted the irrevocable offer, County's action took nothing from Cole "that had not already been taken." *Daniel*, 288 F.3d at 383.

The California authority upon which Cole relies concerns revocable offers of dedication, not irrevocable offers, Pet. at 12-13, and simply highlights that Cole's taking claim is entirely dependent on having this Court reach a different conclusion about the California law of property dedication.[5]

Finally, the determination that the acceptance of an irrevocable offer is not a taking accords with this Court's views in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, decided five years after *Nollan*, this Court acknowledged that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-29. Under California real property law, the recording of an irrevocable offer of dedication is a preexisting limitation on title that extinguishes any right to exclude the public once the irrevocable offer is accepted.

D. Cole's Ripeness Argument Is Meritless

Cole's concurrent assertion that his taking claim was not ripe until the County accepted the permit, Pet. at 15, fails for the same reason that it fails on the merits. Again,

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[5] Cole also relies on *Grupe v. California Coastal Comm'n* 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (Cal.App. 1985) to support his dual taking theory. Pet. at 13. In *Grupe*, the court upheld the Commission's imposition of a condition requiring the developer to make an offer of dedication to mitigate the impacts of his project. The court recognized the contingent nature of the residual "rights" of the landowner and that the landowner's ability to exclude existed only "*until such time as a public agency or private association agrees to accept the offer and concomitant responsibility to police the beach.*" *Grupe*, 166 Cal. App.3d at 170, 212 Cal.Rptr. at 592 (emphasis added).

Cole's argument ignores that California law requires that any challenges to permit conditions, including constitutional challenges, must be brought within the time period for challenging the underlying administrative action. See *Hensler,* 8 Cal.4th at 22, 32 Cal.Rptr. at 257-258; *Ham,* 210 Cal.App.3d at 1493, 258 Cal.Rptr. at 568; *Rossco Holdings,* 212 Cal.App.3d at 657, 260 Cal.Rptr. at 744. As the lower courts found here, Cole's attack on the County's acceptance of the offer of dedication was an attack on the original permit condition and, as in the *Nollan* case itself, any taking claim was ripe at the time that the condition was first imposed in 1980, not nineteen years later.

Moreover, the acceptance of an irrevocable offer of dedication can never arise to a taking because, as discussed, once a landowner records an irrevocable offer of dedication, he irrevocably conveys any right to exclude the public if the offer of dedication is accepted. When the County accepted Bushkin's original offer of dedication, it simply exercised the property interest that Cole's predecessor had irrevocably conveyed to the public, and that Cole had no property interest to prevent. Because a taking claim based on the acceptance of such an offer does not exist, it is pointless to consider when such a claim might "ripen."

Cole also appears to suggest that his ability to attack the 1980 permit condition was somehow resurrected by this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* indicated that a transfer of title does not necessarily bar a taking claim, even though the new owner acquires the property with knowledge of existing regulation. *Palazzolo,* however, did not eliminate the statute of limitations for taking claims, nor did it allow a subsequent landowner to assert a taking claim that the

predecessor had already lost before the transfer. As the court of appeal correctly held in this case, Cole's predecessor did not file a taking claim before the limitations period expired, but instead complied with the restriction and accepted the benefits of the permit. Therefore, Cole "acquired the property subject to an explicit recorded offer of dedication in which the prior landowner conveyed away the very property interest at stake – the right to exclude the public from the property." Pet. App. 14a. *Palazzolo* did not revive taking claims that had expired long before the new owner acquired the property.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

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August 2002 **Counsel of Record*

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(3)

No. 01-1773

IN THE

Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,
Petitioner,

v.

COUNTY OF SANTA BARBARA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner seeks review of a California procedural bar that shields from review, and thereby effectively condones, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property without compensation. In this case, that procedural bar allowed respondent to take a 77,000 square-foot easement that is wildly disproportionate to the modest addition to which the easement is tied, and for which respondent will never pay a penny in compensation. Indeed, in its opposition, respondent nowhere even suggests that its appropriation of this massive easement remotely satisfies the requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Instead, respondent seeks to shield its unconstitutional conduct from review by claiming that the very procedural bar petitioner is challenging constitutes an adequate and independent state law ground that deprives this Court of jurisdiction. This contention is utterly baseless. In adopting its procedural bar, the lower court necessarily decided two questions of federal constitutional law – *i.e.*, (1) that no legally distinct property deprivation occurs when a state entity accepts a coerced offer to dedicate an easement (even though, as respondent concedes, it is only acceptance of the offer that extinguishes a property owner's fundamental right to exclude others from the property), and (2) that a takings challenge for loss of the right to exclude others is ripe when an offer to dedicate an easement is first coerced (even though, at the time of the coercion, no state entity has made a final decision to deprive the owner of this right and the deprivation may never occur). The lower court erred in resolving both of these questions of federal law, and this Court plainly has jurisdiction to review and correct those errors.

Respondent's fallback arguments – that the decision below is correct and in any event raises no important issues – are equally without merit. Respondent itself concedes that the Trust did not lose its right to exclude others from its property until the County accepted the offer to dedicate in 2000 – a concession compelled by California law, and fatal to respondent's claim that the takings claim petitioner asserted was ripe in 1980. The lower court's erroneous disposition of petitioner's claim, moreover, allowed respondent to appropriate property in flagrant violation of this Court's rulings in *Nollan* and *Dolan*. Unless this Court grants this petition, moreover, hundreds of similarly situated property owners will suffer similar deprivations of their constitutional rights. At the end of the day, respondent's opposition serves only to confirm that this Court should review and reverse the decision below.

1. Contrary to respondent's claim, the procedural bar the court of appeal adopted is not an adequate and independent state law basis for the decision below. Rather, in adopting that bar, the lower court indisputably (and incorrectly) resolved two questions of federal takings law – *i.e.*, when does a compensable deprivation of property occur, and when is a challenge to such a deprivation ripe? The procedural bar the lower court invoked, therefore, is inextricably linked to the merits of petitioner's takings claim, and this Court plainly has jurisdiction to determine the propriety of that bar. See, *e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 487 (1989) (Brennan, J., dissenting) (where state and federal law issues "are thoroughly intertwined," the state-court judgment "cannot be said to rest on an 'adequate and independent state ground' so as to bar review by this Court").

In upholding dismissal of this suit as an untimely and improper collateral attack on the California Coastal Commission's original permit decision, the court of appeal necessarily rejected petitioner's argument that, as a matter of

federal takings law, respondent's decision to accept the offer to dedicate worked a legally distinct deprivation of property for which respondent either must pay compensation or demonstrate compliance with the requirements of *Nollan* and *Dolan*. In addition, the court of appeal expressly rejected petitioner's argument that, as a matter of federal law, any challenge to this legally distinct deprivation was unripe, and thus could not have been brought within 60 days of the Coastal Commission's original permit decision. See Opp. 13a. Thus, in adopting its procedural bar, the lower court ruled on petitioner's federal constitutional claims. Where, as here;

> "resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.[] In such a case, the federal-law holding is integral to the state court's disposition of the matter, and [a] ruling [by this Court] on the issue is in no respect advisory."

Int'l Longshoreman's Ass'n v. *Davis*, 476 U.S. 380, 388 (1986) (quoting *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985)).

The state law cases respondent cites in an attempt to demonstrate otherwise, see Opp. 8-10, are inapposite. None involved a challenge to a state entity's acceptance of an offer to dedicate an easement. Rather, the only state actions at issue in those cases were permit decisions.[1] The courts had

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[1] *See Cal. Coastal Comm'n* v. *Superior Court*, 258 Cal. Rptr. 567 (Cal. Ct. App. 1989) ("*Ham*") (post-*Nollan* action seeking to set aside permit condition requiring offer to dedicate property in exchange for permit); *Rossco Holdings, Inc.* v. *State*, 260 Cal. Rptr. 736 (Cal. Ct. App. 1989) (same); *Patrick Media Group, Inc.* v. *Cal. Coastal Comm'n*, 11 Cal. Rptr. 2d 824 (Cal. Ct. App. 1992) (inverse condemnation action by billboard owner seeking compensation for off-site billboards that the owner's lessor removed in order to comply with a permit); *Ojavan Investors, Inc.* v. *Cal. Coastal Comm'n*, 32 Cal. Rptr. 2d 103 (Cal. Ct. App. 1994) (action challenging permit conditions that required the owner's predecessor-in-

no need to decide any question of federal law in these cases; instead, they simply accepted allegations that permit conditions had caused property deprivations, or were otherwise invalid, and concluded that the time for challenging the permit decisions had expired.

This case, in stark contrast, involved two state actions – a permit decision that indisputably did *not* deprive Bushkin or the Trust of the right to exclude others from the subject beach property, and respondent's acceptance, nearly 20 years later, of the compelled offer to dedicate an easement, which *did* strip the Trust of this property right. Petitioner's claims that respondent's acceptance gave rise to a compensable property deprivation, and that any challenge to that deprivation would have been unripe in 1980, required the lower court to decide two questions of federal law that simply were not at issue in the cases respondent cites. Accordingly, application of the procedural bar the lower court invoked is inextricably tied to the court's resolution of federal questions, and this Court has jurisdiction to review the decision below.[2]

2. Respondent's arguments on the merits fare no better.

a. In response to petitioner's taking claim, respondent contends, first, that the lower court simply made a "factual

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interest to record development restrictions on building sites, including a dedication of an easement); *County of Imperial* v. *McDougal*, 564 P.2d 14 (Cal. 1977) (action challenging a condition in a special permit granted to predecessor in title); *City of Santee* v. *Superior Court*, 279 Cal. Rptr. 22 (Cal. Ct. App. 1991) (action seeking declaration that permit conditions that landowner had accepted were invalid); *Pfeiffer* v. *City of La Mesa*, 137 Cal. Rptr. 804 (Cal. Ct. App. 1977) (inverse condemnation action seeking to recover damages allegedly caused by compliance with permit condition that landowner accepted and never challenged).

[2] For these same reasons, there is no merit to respondent's suggestion that petitioner seeks to use the requirements of *Nollan* to evade state law principles of res judicata and waiver. Unlike the property owners in *Ham* and *Rossco Holdings*, petitioner challenges respondent's decision to accept an offer to dedicate an easement, and he brought that challenge well within the 60-day period prescribed by California law.

finding" that petitioner did not actually challenge the County's acceptance as a legally distinct property deprivation. Opp. 16. But the court of appeal's holding that "the validity of the permit condition underlies all of the causes of action," Pet. 12a, is a *legal* conclusion, not a finding of fact. Both the Coastal Commission's decision to require the offer to dedicate and respondent's acceptance of that offer suffer from the same constitutional defect – neither entity demonstrated that there was any nexus between the compelled easement and the project to which it was tied. Because petitioner emphasized that the County could not properly accept the offer in light of this defect, the lower court concluded that petitioner's claim was in substance a collateral attack on the permit condition itself.

This legal ruling is manifestly wrong. As petitioner has demonstrated, and respondent nowhere disputes, the County's acceptance decision is logically and legally distinct from the permit decision. The Coastal Commission's permit decision did not require the County to accept the offer to dedicate. See *Grupe* v. *Cal. Coastal Comm'n*, 212 Cal. Rptr. 578, 592 (Cal. Ct. App. 1985) (noting unlikelihood that a public agency would actually accept the offer to dedicate at issue in that case). In making the purely discretionary decision to accept the offer, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original permit decision did not, by itself, cause.

Second, respondent argues that petitioner's "theory" that the County's acceptance is a separate taking is based on a misreading of California law. Opp. 16. But respondent itself repeatedly acknowledges, as it must, that the Trust did not lose the right to exclude others from its property until the County accepted the offer to dedicate. Thus, the County concedes that "[o]nce the landowner records an irrevocable

offer of dedication, he has conveyed away the right to exclude the public *should the irrevocable offer ever be accepted*." *Id.* (emphasis added).[3] Similarly, respondent acknowledges that the owner of property subject to an offer to dedicate retains the "right to exclude others while the irrevocable offer of dedication is outstanding," and that this right is "subject to immediate extinction *once the agency accepts the offer*." *Id.* at 17 (emphasis added).

These concessions are dictated by California law, which unambiguously provides that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to an easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted" and, until accepted, "there is no easement"); *Baldwin* v. *City of L.A.*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." *Grupe*, 212 Cal. Rptr. at 592. See also *Whalers' Village Club* v. *Cal. Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).

In light of this well-settled law, there is no basis whatsoever for respondent's assertion that "acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right," Opp. 17, or for the Ninth Circuit's equally erroneous

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[3] This concession is compelled by the offer itself, which provides that it grants an easement only "'[u]pon recordation *of an acceptance of this Offer by the Grantee*.'" *See* Opp. 16 (emphasis altered) (quoting offer).

conclusion that acceptance of an offer to dedicate takes nothing "that had not already been taken" when the property owner was compelled to record the offer. *Daniel* v. *County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *pet. for cert. filed*. No. 02-107 (U.S. July 17, 2002). Prior to acceptance, the Trust retained "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Acceptance indisputably took that very right from the Trust. Analogizing an offer to dedicate to an options contract, see Opp. 17, does not and cannot alter this central fact: whatever right an offer to dedicate confers on a public agency, it is the public agency's *exercise* of that right, not the owner's *conferral* of that right, that divests the property owner of the fundamental right to exclude others.[4]

Finally, nothing in *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992), supports respondent's claim that acceptance of the offer to dedicate worked no deprivation of property. In *Lucas* the Court noted that exercise of a *previously granted easement* would not constitute a separate taking. See *id.* at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"). *Lucas* was careful to note,

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[4] Respondent's suggestion that the California law upon which petitioner relies concerns revocable rather than irrevocable offers, Opp. 18, is simply untrue. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access and passive recreational use along the shoreline.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer). In all events, there is no meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period of time. Just as acceptance prior to revocation of a revocable offer to dedicate is necessary to strip a property owner of the right to exlcude others, so too here, acceptance prior to the expiration of the offer Bushkin recorded was necessary to strip the Trust of its right to exclude others from its property.

however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did not limit the Trust's ability to exclude others.

b. Respondent's contention that the Trust's taking claim was ripe in 1980, when Bushkin was first required to record an offer to dedicate, Opp. 19, fails for the same reason. Indeed, this contention is completely inconsistent with respondent's own concession that no easement was created in the Trust's property until the County accepted the offer to dedicate in 2000 – a concession which, as just noted, is compelled by California law. Contrary to respondent's claim, moreover, *Nollan* does not demonstrate that a ripe claim exists once a government entity imposes conditions on a permit. In arguing otherwise, respondent ignores the critical fact that the landowner in *Nollan* was required to record an easement, not an offer to dedicate an easement. Thus, in *Nollan*, compliance with the permit condition would have worked an immediate deprivation of the right to exclude others from the property. Here, no such deprivation occurred until respondent accepted the offer to dedicate in 2000.

Nor does respondent offer any response to petitioner's showing that the court of appeal's erroneous ripeness determination would allow a recording landowner to obtain an undeserved windfall. If a taking associated with the acceptance of an offer to dedicate an easement were to ripen at the time an offer was recorded, the landowner at that time would be entitled to compensation for the full value of a property loss that might never materialize, or, as happened in this case, that might be suffered by a subsequent property owner. The creation of such windfalls demonstrates that it is not "pointless" to consider when a property owner may assert a ripe takings challenge to an appropriation of property that is effectuated through two governmental steps rather than one.

3. Finally, respondent's claim that this case raises no important issues of federal law is, at best, unpersuasive, and, at worst, cynical. Nowhere in its opposition does the County attempt to refute petitioner's showing that the appropriation of the Trust's property was undertaken in flagrant violation of this Court rulings in *Nollan* and *Dolan*. Nor does respondent deny that the Coastal Commission is urging agencies throughout the State to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting easements could satisfy the requirements of the Fifth Amendment. Such open flouting of this Court's rulings is itself an important reason to grant review.

Nor is there the slightest merit to respondent's incredible assertion that the hundreds of other similarly situated property owners will likely welcome confiscation of their property by local governments. *Id.* at 13. The retaliatory tactics the Coastal Commission employed against petitioner in this case,[5] coupled with the California Supreme Court's decision to leave the decision below undisturbed, ensures that few if any landowners will have the temerity to contest appropriations of easements across their property, no matter how egregious the resulting constitutional violation. Thus, the absence of challenges like the one petitioner has mounted is not evidence that property owners do not object to the unconstitutional appropriation of their property, but merely confirms that the Coastal Commission and local governments are succeeding in thwarting the requirements of *Nollan* and *Dolan*. These entities will only be further emboldened if this Court denies the petition. Moreover, the decision below provides a clear roadmap that other States can use to escape this Court's holdings in *Nollan* and *Dolan*.

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[5] The Coastal Commission took the extraordinary step of threatening petitioner personally (not as Trustee) with fines totaling millions of dollars. Under the threat of this severe penalty, petitioner entered into a settlement agreement, whereby the Trust paid $460,000 on the understanding that the funds would be used for an environmental project.

For these same reasons, the absence of a conflict in the lower courts provides no basis for ignoring the blatant violation of constitutional rights that occurred in this case. See *id.* at 12. Local governments have only recently begun accepting the offers to dedicate that the Coastal Commission coerced decades ago, and the Commission has made an example of petitioner to all others who might seek to fight acceptance of such offers. The fact that the Ninth Circuit rejected the only other takings claim to reach an appellate court underscores the need for this Court's review. The Ninth Circuit's decision in *Daniel* suffers from the same flawed reasoning as the decision below, and has closed off the only other avenue for preventing wide-scale defiance of *Nollan* and *Dolan*. Indeed, the decision in *Daniel* is also the subject of a petition for a writ of certiorari before this Court. See Petition for a Writ of Certiorari, *Daniel* v. *County of Santa Barbara*, No. 02-107 (U.S. filed July 17, 2002).[6] Absent this Court's intervention, government entities across California will be free to accept hundreds of soon-to-expire offers to dedicate property, coerced in blatant violation of the Constitution, and government entities in the other eight states within the Ninth Circuit will be able to follow suit. .

CONCLUSION

This Court should grant the petition for certiorari.

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[6] Petitioners have no objection to the consolidation requested in *Daniel* v. *County of Santa Barbara*, No. 02-107 (U.S. filed July 17, 2002), should the Court decide to grant the *Daniel* petition as well.

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